No. 85-1364

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

HERSHEL CLADY, et al.,
Petitioners.

vs.

COUNTY OF LOS ANGELES,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The respondent, County of Los Angeles, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case reported at 770 F.2d 1421. The reasons advanced by petitioners are not supported by the record and do not warrant the granting

of the discretionary writ.

In the alternative, respondent urges that the writ be granted to reexamine the rationale and applicability of this Court's opinion in Connecticut v. Teal, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982).

STATEMENT OF THE CASE AND BACKGROUND

This is a class action brought under Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e et seq.). Petitioners are certain unsuccessful black and hispanic applicants who, purporting to represent all such former and future applicants, challenged certain aspects of the County's 1979 entry-level firefighter selection procedure under the theory of "disparate impact."[1/]

[1/] The examination in question was open to applicants at least 18 years of age, but

(cont.)

The genesis of the instant case can be found in the history of prior litigation chronicled by this Court in County of Los Angeles v. Davis, 440 U.S. 625, 59 L.Ed.2d 642, 99 S.Ct. 1379 (1979). In Davis, this Court recounted the County's self-generated efforts in the early seventies to increase

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1/ (cont.)

not older than 29. Applicants had to have a high school degree or its equivalent. Applicants were first given a written test. If they scored at least 53 correct out of 95 multiple choice questions, they were passed on to an oral interview. An "eligible list" was then created and applicants were ranked on the list in relative order by weighting the written examination by 25% and the oral interview by 75%. As openings arose, applicants were chosen from the list and administered a physical agility test on a pass/fail basis. If they passed, they were then admitted to the next training class at the Fire Academy.

In the proceedings below, petitioners challenged the education requirement, written examination and the physical agility test. Petitioners' arguments in their petition for certiorari are, however, limited to the written test. Petitioners have apparently conceded the lack of merit to their challenge below to the education requirement and to the physical agility test.

minority representation in its Fire Department. Specifically, in 1971 the County abandoned the use of a 1969 written examination which, in the County's own assessment, proved to have an undesirable effect upon minority hiring efforts, and in its place devised a pass-fail written examination from which successful applicants would then be selected at random for further oral interview and physical agility testing. The pass-fail portion of the examination was given in January of 1972, and resulted in a ninety-seven percent passing rate having no significant impact on minority hopefuls. Before the County could implement the random-selection process, however, it was enjoined from doing so in state court based on allegations that random-selection would violate the County Charter and its civil service merit regulations. (440 U.S. at pp. 626-631.)

Unable to complete the entire examination process and faced with a critical firefighter shortage, the County proposed to interview and hire from the top 544 applicants on the 1972 written examination in order to meet the Fire Department's urgency requirements. The proposal was not intended to eliminate the remaining applicants from later consideration. However, because of objections by minority representatives and the advent of subsequent litigation, the proposal was never implemented. (Id.)

In 1973, the Davis class action was filed, challenging the 1969 written examination and the County's proposal to interview the top 544 applicants on the 1972 written examination. Finding no discriminatory intent, the District Court nonetheless imposed a sweeping quota hiring order, requiring the County to hire one black and one hispanic

for every three whites. The Ninth Circuit later reversed the District Court with respect to the 1969 examination, finding that the named plaintiffs lacked standing, but upheld the District Court's imposition of the quota hiring order based on the County's 1972 urgency hiring proposal. That order remained in effect from 1973 through 1979, the date of this Court's opinion in Davis which held that the controversy concerning the 1972 proposal had, over the passage of time, become moot. This Court, however, expressed its view that it was "extremely doubtful" whether any impermissible discrimination had, in fact, occurred. (440 U.S. at p. 1633.) The four dissenting justices, moreover, while not concurring with the majority's mootness holding, agreed that the quota hiring order was, in any event, unjustifiable. (440 U.S. at pp. 634-647 and fn. 12.)

It is against this background that the arguments advanced by Petitioners must be viewed. In their petition, they selectively quote one sentence taken out-of-context from the majority opinion in Davis, from which and without discussion of the Davis case itself they seek to raise an inference that the firefighter selection procedure implemented by the County in 1979 constitutes an attempt to "revert" to pre-Davis discriminatory practices. [2/] Petitioners' incomplete quotation from Davis,

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[2/] Petitioners quote the statement in the majority opinion, made in conjunction with the Court's mootness analysis, that "[t]here has been no suggestion by any of the parties, nor is there any reason to believe, that petitioners would alter their present hiring practices if the injunction were dissolved." (440 U.S. at p. 632.) Petitioners omit the following sentence in which the Court explained that "[a] fortiori, there is no reason to believe that petitioners would replace their present hiring procedures with procedures that they regarded as unsatisfactory even before the commencement of this litigation." (440 U.S. at pp. 632-633; emphasis added.)

deleting discussion of the facts of the case and parts not favorable to their argument, is at best, seriously misleading, being calculated to divert the Court's attention from an accurate understanding of the historical perspective underpinning the present controversy, and the District Court's findings in the instant case.

The firefighter selection procedure utilized by the County in 1979 is in full accord with both federal and state law, as well as being designed to select the best candidates for the job. If anything, the County is to be lauded for its continuing sensitivity to the process of selection of qualified minorities, efforts which the Ninth Circuit praised and petitioners blindly ignore (770 F.2d at p. 1434), while at the same time being committed to providing and maintaining the finest level of public fire protection services available anywhere.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Record Does Not Support Petitioners' Reliance On Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

Put simply, petitioners' legal arguments attacking the County's validation studies are premised on a selective mischaracterization of the District Court's exhaustive findings.[3/] Armed with that mischaracterization, petitioners lurch to

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[3/] Petitioners, in their attempt to evade those findings, go so far as to engage in needless affrontery by suggesting that Judge Lucas, now an Associate Justice of the California Supreme Court, somehow allowed himself to be duped into signing inappropriate findings proposed by the County. (Petition, p. 11.) There is not so much as a scintilla of evidence in the record in support of this attack on the integrity of the trial judge. To the contrary, the Ninth Circuit properly noted that Judge Lucas was careful to reject those proposed findings "with which he disagreed." (770 F.2d at p. 1427, emphasis added.)

the conclusion that the Ninth Circuit "... rejected this Court's ruling in Albemarle Paper Co. v. Moody, supra, ..." (Petition, p. 12.)

In Albemarle, this Court criticized the employer's validation study because it included only job-experienced, white workers, while excluding new job applicants (including minorities) who actually took the tests in question. (442 U.S. at p. 435.) Distinct from the situation in Albemarle, the County's validation studies included all test takers who passed the written examination and then completed training at the Fire Academy, and compared their actual performance on that examination with their actual performance at the Academy. (Finding No. 16.) The County's studies established a significant positive correlation between comparative success on the written test and important elements of firefighter training. (Id.)

Albemarle requires that minority as well as white applicants be included in validation studies which seek to demonstrate the job relatedness of a selection device. It does not, as petitioners claim, require that separate validation studies be performed for each minority group separately. Indeed, the very suggestion that racial groups need be isolated and tested on a separate basis smacks of racial stereotyping. The issue for validation purposes is not whether one racial group performs better on a given test than another. The question is whether the test is fairly related to the necessary job skills or work characteristics. The District Court specifically found in this regard that the job-relatedness of the 1979 written test "... improves the chances of selecting qualified recruits from 9% to 48% [.]" (Finding No. 17(d)(2)(g).[4/]

[4/] See p. 12.

No validation study will ever satisfy those, like petitioners, intent on finding fault at any cost. The concurring remarks of Justice Blackmun in Albemarle, supra, 422 U.S. at p. 449, are an appropriate rejoiner to petitioners' unrealistic and impractical interpretation of this aspect of Title VII:

> "The simple truth is that pre-employment tests, like most attempts to predict the future, will never be completely accurate. We should bear in mind that pre-employment testing, so long as it is fairly related to the

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4/ Despite an overrepresentation of minority examinees and aggressive minority recruitment efforts which resulted in an atypical pool, "... the 1979 Firefighter Examination substantially reduced the percentage of [Academy] terminees who were black from 69% during the quota years to 17.2%[.]" Finding No. 19(d)(2)(g).)

job skills or work characteristics desired, possesses the potential of being an effective weapon in protecting equal employment opportunity because it has a unique capacity to measure all applicants objectively on a standardized basis. I fear that a too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII."

2. Petitioners Failed To Identify Any "Less Discriminatory Alternative" To The Written Examination.

The District Court devoted extensive findings to the question whether petitioners were able to demonstrate an alternative selection device to the written portion of the 1979 examination which would have a less disproportionate impact upon minorities and which would still meet the County's legitimate needs. (Finding No. 19.) The District Court found that petitioners failed to identify any selection procedure which would serve as a suitable alternative. (Finding No. 19(a).) Rather, petitioners engage in the simplistic argument that: (1) hiring under the Davis-era quota order from 1973-1978 resulted in more minority hires, and (2) hiring under the County's civil service "banding" rule adopted in April of 1981, as

opposed to the traditional civil service "rule of three," would result in more minority hires. (See, Findings Nos. 9 and 10.)

To argue, as petitioners do, that a quota hiring order is a "less discriminatory alternative" is simply to argue for the absurd. A quota is, itself, an inherently discriminatory device which is to be utilized only for the most exigent remedial purposes. Not only would a self-imposed quota violate Title VII, but the selection process that was in effect from 1973 through 1979 was shown to have lesser validity as a predictor of job success than the 1979 examination, as well as having a greater financial impact on the County.

Petitioners' argument that the County's banding rule is a "less discriminatory alternative" fails, if for no other reason, because petitioners presented no evidence

on the impact of the banding rule on minority hiring after April of 1981. (770 F.2d at p. 1433.) Use of the banding rule prior to April of 1981, moreover, would have required the County to violate its own presumptively valid state charter. Ironically, in arguing for the banding rule petitioners are, in fact, arguing for a rule which provides a public employer far more discretion in hiring than the traditional rule of three. Petitioners are thus complementing, albeit backhandedly, the County's proven commitment to affirmative action once qualified applicants have been identified through the selection process. That ultimate committment, however, is no alternative to the selection process itself.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. Connecticut v. Teal, Supra, Was Improvidently Decided And Should Be Reversed Or Limited.

A respondent, without cross-petitioning, is "entitled under our precedents to urge any grounds which would lend support to the judgment below ...." (Dayton Board of Education v. Brinkman, 433 U.S. 406, 419, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977).) And while respondents recognize that this Court should not lightly overrule recent precedent, neither should it hesitate to do so when it is apparent that the prior case was wrongly decided. (Garcia v. San Antonio Metropolitan Transit Authority, 496 U.S. ____, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985).)

There was never any question in this litigation that the overall 1979 selection process had no adverse effect on minorities. Early in its opinion, the Ninth Circuit observed:

> "The plaintiffs concede that there is no 'bottom line' adverse impact on blacks and Hispanics when evaluating the total selection process. Significantly, the district court found that there was '[n]o statistically significant difference between hires of Blacks and Hispanics and their representation in the Civilian Labor Force....' Finding No. 14(a)(1).
>
> "However, in Connecticut v. Teal, the Supreme Court held that discrete pass/fail barriers having

adverse impact must be individually validated even if there is no 'bottom line' disparate impact for the entire multi-component selection process. 457 U.S. at 442, 452, 102 S.Ct. at 2528, 2533." (770 F.2d at p. 1429.)

The arguments against the rationale underlying Teal, a 5-4 decision, are persuasively articulated by Justice Powell in his dissenting opinion, and will not be repeated here.

Teal, however, was an action brought by individual applicants, and it was on the theory that Title VII protects individuals, rather than the minority group as a whole, that the majority in Teal rested its opinion. Here, to the contrary, petitioners were permitted in the context of a monolithic class action to assert Teal as a challenge

to discrete portions of the overall examination process. (See, Findings Nos. 1 and 13.) Far from having a commonality of interest, the interests of the class were inherently in conflict. For example, the failure of one individual member of a minority group to pass the educational requirement reduced competition and thus necessarily inured to the benefit of other members of that same minority group, who may have stumbled in later portions of the examination process. Respondents submit that rarely, if ever, is a class action appropriate under the rationale of Teal, and urge the court to limit its applicability accordingly.

Respectfully submitted,

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